IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*,
Appellants,

v.

WANDA JUNE WEEKS, *Appellee.*

On Appeal from the United States District Court for the Western District of Oklahoma

BRIEF FOR THE DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL.

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BRIEF FOR THE DELAWARE TRIBAL BUSINESS COMMITTEE, ET AL.

OPINION BELOW

The opinion below is that of a three-judge court of the United States District Court for the Western District of Oklahoma in *Weeks v. United States,* 406 F. Supp. 1309 (W.D. Okla. 1975).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1252 and 1253 (1970). A three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 and 2284 (1970), held unconstitutional an Act of Congress providing for distribution of an Indian Claims Commission award and enjoined the Secretary of the Interior from distributing funds pursuant to the statute. The jurisdiction of the District Court was founded on 28 U.S.C. § 1331 (1970). It entered its judgment on December 18, 1975.

Appellants herein filed a Notice of Appeal on January 16, 1976, and a Jurisdictional Statement on March 12, 1976, which was docketed as *Delaware Tribal Business Committee, et al. v. Weeks,* No. 75-1301. On June 14, 1976, this Court noted probable jurisdiction of the appeal and ordered it consolidated with *Absentee Delaware Tribe of Oklahoma Business Committee, et al., v. Weeks, et al.,* No. 75-1335, and *Kleppe, et al., v. Weeks, et al.,* No. 75-1495.

QUESTIONS PRESENTED FOR REVIEW

1. Where a treaty between the United States and the Delaware Nation expressly provides for the distribution of all proceeds from the sale of tribal land for the benefit of the Delaware people and, where, under a subsequent treaty, certain members of the tribe alienated themselves from the tribe becoming solely Americans and renounced all rights to share in the tribal property, does the claim by their descendants that Congress unlawfully excluded them from participating in compensation awarded by the Indian Claims Commission for failure of the United States to sell the

tribal lands in the manner required by the first treaty present a justiciable controversy?

2. Did Congress act with patent arbitrariness and without rational justification in providing that an Indian Claims Commission award redressing breach by the United States of an 1854 Treaty should be distributed solely to the tribal bodies and to those currently holding citizenship in the Delaware Nation, to the exclusion of persons having Delaware ancestry but whose ancestors, pursuant to treaty with the United States in 1866, for valuable compensation, "dissolved" their Delaware citizenship and became citizens solely of the United States and who thereafter never have been recognized as members of the Delaware Nation?

PROVISIONS OF THE CONSTITUTION, TREATIES AND STATUTES INVOLVED

The pertinent parts of the Constitution provide:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . . U.S. CONST. art. II, § 2, cl. 2.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . . U.S. CONST. art. III, § 2, cl. 1.
>
> No person shall be . . . deprived of . . . property, without due process of law . . . . U.S. CONST. amend. V.

The relevant treaties and statutes involved are set forth in the Attachment to this brief. They are:

> Treaty of May 6, 1854, 10 Stat. 1048.
> Treaty of July 4, 1866, 14 Stat. 793.

Act of June 22, 1874, ch. 389, 18 Stat. 146, 175.
Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222.
Act of Sept. 21, 1968, 25 U.S.C. §§ 1181-86 (1970).
Act of Oct. 3, 1972, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974).

STATEMENT OF THE CASE

Originally resident on the eastern seaboard of what is now the United States, the Delaware Nation inexorably was driven westward and became geographically scattered by the early 19th century. J.S. App. 6a.[1] The main body of the tribe by this time lived on lands in Indiana and Ohio. Some Delawares, known as the Munsees, had migrated to New York and Canada. Others had crossed the Mississippi River to occupy land granted them in Missouri by Spain and, later, to move south to Arkansas, Texas, and Oklahoma. *Id.* Some descendants of these "southern" Delawares eventually settled in western Oklahoma in 1853 and are the ancestors of the modern Absentee Delaware Tribe. J.S. App. 7a-8a.

Through the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana and Ohio to the United States in exchange for land west of the Mississippi and settled in Missouri where they remained until 1829. J.S. App. 6a-7a. In that year the Delawares signed another treaty, designated as a supplemental article to the Treaty of 1818, whereby the Tribe agreed to accept, as part payment for the Indiana cession, a "permanent" reservation in Kansas. 7 Stat. 327; J.S. App. 7a.

[1] J.S. App. references are to the opinions of the District Court which appear in the Appendix to appellants' Jurisdictional Statement in No. 75-1301 at pages 1a-87a.

The Delaware Tribe, on May 6, 1854, entered into another treaty with the United States providing for cession of much of the Tribe's Kansas reservation. 10 Stat. 1048, Attach. 1a. Under Article 1 of the Treaty, the Delawares retained certain of their residence lands (the "diminished reserve") as a home, but ceded the remainder (the "trust lands") and the "hunting outlet." 10 Stat. 1048, Attach. 1a-2a; J.S. App. 8a. In Article 2, the United States promised to offer the ceded land for sale at public auction with the proceeds from all sales to be paid to the Delaware general tribal fund. 10 Stat. 1048-49, Attach. 2a-3a; J.S. App. 8a. In 1856 and 1857, however, the United States breached the provisions of Article 2 by selling the trust lands without public auction. J.S. App. 8a. As a result, the Tribe received far less from the sale of their lands than it should have—a fact which resulted in the Indian Claims Commission award in Dockets 72 and 298 and enactment of the distribution statute, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), the constitutionality of which is the subject of this appeal.

The 1854 Treaty further provided that all proceeds from the land sales in excess of the amount necessary to meet current tribal wants would be paid to "a permanent fund [created] for the benefit of the Delaware people" to be invested by the President of the United States, "the interest to be applied annually for the civilization, education, and religious culture of the Delaware people . . . ." Art. 7, 10 Stat. 1050, Attach. 5a. Moreover, Article 8, expressing the parties' recognition that annual receipts from the sale of lands could not be predetermined, provided that:

> . . . the whole subject be referred to the judgment of the President, who may, from time to time,

> prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment . . . ; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

10 Stat. 1050, Attach. 5a.

In 1866, the Delaware Tribe agreed by treaty to sell the remainder of its Kansas land and to remove to Indian Territory, now Oklahoma. Treaty of July 4, 1866, 14 Stat. 793, Attach. 10a. The United States, in turn, agreed to apply the proceeds from the sale of the Delaware land to the purchase of 160 acres of land from other tribes in Oklahoma for each Delaware. Art. IV, 14 Stat. 794, Attach. 13a.

Article III of the Treaty, however, allowed all adult Delawares the opportunity to elect to "dissolve" their relations with the Tribe, to reserve lands allotted them in 1860 from sale under the Treaty, and to become citizens of the United States. 14 Stat. 794, Attach. 12a-13a; J.S. App. 9a. Those Delawares who so chose to alienate themselves from the Tribe received, in exchange for their election, fee simple title to an 80-acre tract of land previously allotted, payment for all improvements made on such land, payment of their just proportion of the cash value of the credits of the Tribe "then held in trust by the United States" (this included proceeds from the sale of the Kansas trust lands), and payment of the individual's proportion of the proceeds from the sales under the 1866 Treaty.

Art. IX, 14 Stat. 796, Attach. 16a-17a; J.S. App. 9a. Article IX of the Treaty further stated that those persons who elected not to remove to Oklahoma but, rather, to become citizens of the United States

> . . . shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

14 Stat. 796, Attach. 17a.

A total of 21 adults and their 49 minor children elected citizenship and expatriation and were registered as having done so as required by Article IX.[2] J.S. App. 9a-10a. The descendants of those Delawares who renounced their tribal relations and remained in Kansas constitute the members of the so-called Kansas "Delaware" class, better named "alien claimants," plaintiffs/appellees in this action. The Tribe thus removed to lands in Oklahoma occupied by the Cherokee Nation and, in 1867, 985 persons were registered there as Delawares. These "registered Delawares" are the ancestors of the appellant Cherokee Delaware class, the modern Delaware Tribe of Indians. J.S. App. 10a.

Removal to Indian Territory was accomplished pursuant to an 1867 agreement between the Delawares and the Cherokees. J.S. App. 10a. In accord with

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[2] Under the treaty terms the minor children of those who elected to stay in Kansas did not immediately become citizens; but, in 1874, Congress declared such persons to be citizens, appropriated funds to pay them their proportionate share of assets held in trust for the Delaware Tribe, and directed the Secretary of the Interior to issue them fee simple title to lands allotted them under the 1866 Treaty. Act of June 22, 1874, ch. 389, 18 Stat. 146, 175, Attach. 21a; J.S. App. 12a.

that contract, each Delaware, using the proceeds from sale of the tribal lands, purchased a life estate in 160 acres of land and the right to become a member and citizen of the Cherokee Nation. J.S. App. 10a-11a. The Indian Claims Commission held, as the basis for all Delaware tribal claims before it, that "the Delaware Indians who removed to the Cherokee territory . . . maintained group identity, receiving annual payments from their own tribal funds, having tribal chiefs and groups and business committees continuously until the present time and at the present time."[3] The District

[3] *Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm'n 253, 260 (1952) (Finding No. 8), *aff'd*, 128 F.Supp. 391, 398 (Ct. Cl. 1955) (finding of fact affirmed, reversed on other grounds.) The Commission, in its Opinion, further elaborated on Finding No. 8:

> It is undisputed that the main body of the Delawares and the group with whom the [United States] dealt as representing the Delaware Nation following the treaty of September 24, 1829, removed to the reservation ceded to the Delawares in Kansas, and that following the agreement of April 8, 1867, this group removed to the Cherokee Territory and its members, or most of them, became incorporated and merged for many purposes with the Cherokees. Nevertheless, this incorporation and merger did not result in the destruction of the continued activities of those so incorporated with the Cherokees as a distinct identity. They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments for many years from their own tribal funds, separate from the Cherokees. They had separate tribal funds in the hands of the U.S. as late as 1906. They were governed by hereditary tribal chiefs until the death of Charles Journeycake in 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group. *Id.* at 265.

Court materially adopted this finding of fact as the basis of its holding that the Cherokee Delawares were entitled to share in the awards in Indian Claims Commission Dockets 337 and 72 and 298, J.S. App. 11a, which the Kansas "Delawares" appealed in Case No. 75-1328. Probable jurisdiction has not been noted in that case. The Delaware Tribe of Indians is today a federally recognized tribe operating under by-laws approved by the Commissioner of the Bureau of Indian Affairs. See Defendants Secretary and Delaware Tribal Business Committee Exh. 25, App. 101.

Congress, in passing the challenged distribution statute, chose as the basis for determining the eligibility of the Delaware Tribe a 1906 Delaware per capita payroll. 25 U.S.C. § 1292 (Supp. IV, 1974). That roll originated in a series of suits, one of which concerned cession of the Kansas "outlet" in 1854, brought by the Delawares pursuant to a special jurisdictional authorization by Congress. Act of July 1, 1902, ch. 1375, § 68, 32 Stat. 716, 726; J.S. App. 13a-14a n.15. In 1904, Congress appropriated funds for the payment of $150,000 in settlement of the pending tribal claims to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . . ." Act of April 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222, Attach. 22a. The Delaware Tribal Council subsequently adopted a resolution declaring that members of the Tribe consisted of those Delawares on the 1867 register and their descendants. App. 90. A subsequent Council resolution authorized the United States to prepare a list of all persons eligible to receive a per capita payment of the settlement fund. See 25 Op. Att'y Gen. 308, 310 (1904).

In the course of this roll's compilation, representatives of the Delaware Tribe requested that the Department of the Interior determine whether any Kansas Delawares were eligible to be included in the payment. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of Jan. 25, 1905, App. 96. The matter was referred by the Secretary to the Comptroller of the Treasury. The Comptroller's decision held that Congress had appropriated funds payable to the Delaware *Tribe* "and that the Delaware Indians who, under the provisions of Articles III and IX of the treaty of July 4, 1866, . . . elected to dissolve their tribal relations and became citizens of the United States, are not legally entitled to be enrolled for participation in the distribution of said sum." 11 COMP. DEC. 496, 501 (1905). Accordingly, the Secretary of the Interior instructed the Union Indian Agency to compile the Delaware payment roll on the basis of the 1867 register and descent therefrom and to exclude those persons who had dissolved their tribal relation and had taken their allotments in Kansas. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of March 22, 1905, App. 96. The roll was completed according to instruction and approved in 1906. *Id.; see* J.S. App. 14a n.15.

History of the Indian Claims Commission Litigation

In 1951, members of the Absentee Delaware Tribe sued in the Indian Claims Commission (Docket No. 337) claiming additional compensation for lands ceded under the St. Mary's Treaty of 1818. J.S. App. 12a. The Commission found the value of the ceded Indiana lands to be far in excess of the lands received in Kansas by the Tribe and awarded $1.63 million "on behalf of

the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." *Absentee Delaware Tribe of Oklahoma v. United States,* 9 Ind. Cl. Comm'n 346 (1961); J.S. App. 12a. The suit had been filed on behalf of *all* descendants of the Tribe.

Funds were appropriated for payment of the judgment, and, in 1968, Congress passed legislation providing for its distribution. 25 U.S.C. §§ 1181-86 (1970). The distribution act provided that one was eligible to participate if his name or that of a lineal ancestor appeared on the 1906 Delaware per capita payroll, the 1940 Absentee Delaware constructed base census roll (or was eligible to be on such roll) or if he was able to show lineal descent from a member of the Delaware Nation as constituted in 1818. 25 U.S.C. § 1181 (1970). Thus the eligibility of the Cherokee Delawares (Delaware Tribe of Indians) was established through the 1906 roll, the Absentee Delawares through the 1940 roll, and the Kansas "Delawares" and others through the "catchall" clause. Distribution of the Docket 337 funds has never been completed owing to conflicting and unwarranted claims, administrative appeals, and the present litigation.

Parallelling the Docket 337 litigation was the Commission's adjudication and judgment of claims in Dockets 72 and 298, the distribution of which is the subject of this appeal. In 1950 and 1951, the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Indians filed claims in the Commission for an accounting under the 1854 Treaty. J.S. App. 15a-16a. The United States conceded it had violated Article 2 of the Treaty by not selling the Delaware trust lands at public auction, and the Commission granted judgment "to the plaintiffs" in the amount of

$9.17 million as of August 31, 1969. Those funds have been appropriated but not distributed.

The distribution act for the Dockets 72 and 298 judgment, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), made eligible for participation those living on the date of enactment whose name, or the name of a lineal ancestor, appeared on the 1906 Delaware per capita payroll or on the 1940 constructed base census roll of the Absentee Delaware Tribe (or was eligible to be on the roll). There was no catchall provision basing eligibility solely on descent from the 1854 Tribe, and the Kansas "Delawares" and others were thus excluded. This distribution statute also differed from the earlier Act in that it provided for payment of 10 percent of the appropriated funds to the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma to be expended or invested for any purpose authorized by the tribal governing body and approved by the Secretary of the Interior. 25 U.S.C. § 1294 (Supp. IV, 1974).

Litigation in the District Court

Appellees filed two suits on behalf of themselves and as representatives of the descendants of the Kansas "Delawares" challenging the constitutionality of their exclusion as a class from distribution of the Docket 72 and 298 funds, the inclusion of the Cherokee and Absentee Delawares in that award, and the inclusion of the Cherokee Delawares in the Docket 337 distribution. J.S. App. 4a. The cases were consolidated and a three-judge court was convened to hear the matter.

The majority of the court held, over a vigorous dissent, that the exclusion of the Kansas "Delawares"

under the terms of 25 U.S.C. § 1292 had no rational basis and thus violated the due process clause of the fifth amendment. J.S. App. 35a-51a, 64a. The court permanently enjoined the Secretary of the Interior from distributing funds pursuant to the statute.

The court unanimously rejected all assertions that the Cherokee and Absentee Delawares were ineligible to participate in the questioned funds.

Appellants Delaware Tribal Business Committee and its members in Case No. 75-1301, the Absentee Delaware Tribal Business Committee and its members in No. 75-1335, and the Secretary of the Interior in No. 75-1495 each appealed the District Court's ruling that the exclusion of the so-called Kansas "Delawares" in 25 U.S.C. §§ 1291-97 was unconstitutional. On June 14, 1976, the Court noted probable jurisdiction of all three appeals.

SUMMARY OF ARGUMENT

Although this case does not arouse passion and emotion as have several the Court has faced in recent years, it presents a grave constitutional question—the proper role of the judiciary under a written constitution creating a government of separated powers. It is fortunate that this serious question arises in a relatively calm, rather than an emotional, setting.

The Court is well aware that there has been debate as to whether federal courts in recent years have failed to restrain themselves to their proper field. In the case at bar the District Court has undertaken to instruct Congress as to how it shall deal with Indian tribes. In so doing it entered a field reserved for the political departments of the Government and, in deciding a due process contention it believed it was at liberty to decide, said it is irrational to draw a distinction between Indian tribes and their members and ordinary American citizens of some degree of Indian descent. In short, it blinded itself to an important distinction or classification that exists under rules of common sense and should not be ignored in constitutional law.

When inferior federal courts assume a general power of superintendence over the executive and legislative branches of the Government, only this Court can correct them and restore the separation and division of powers upon which our Government rests.

ARGUMENT

I. The Claim of Appellees that the Distribution Statute Should Be Reformed To Include American Delaware Aliens as Beneficiaries of an Award for Violation of a Treaty Made Solely for the Benefit of "the Delaware People" Presents a Political, Nonjusticiable Controversy.

Virtually from the establishment of our Government, the problem of dealing with Indians and perhaps compensating them for loss of the use of land they had been occupying has been deemed to be a political question to be handled solely by political branches of the Government and not a case or controversy for resolution by the judiciary. The executive and the legislative branches have tried varying methods of dealing with the problem. This Court has ruled consistently that since the power to administer tribal property, whether land, or money in lieu of the land, is "political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 308 (1902). And if the political branches are believed to have erred "relief must be sought by an appeal to [Congress] for redress, and not to the courts." *Lone Wolf v. Hitchcock,* 187 U.S. 553, 568 (1903).

Before showing the legal force of this doctrine and its application to the treaties and facts here involved it may be instructive to observe, from a practical point of view, what departure from it has meant thus far in this case.

We find the following anomalous situation: The majority of the District Court reasoned that if the

Kansas lands had been sold in 1856 and 1857 at public sale they would, theoretically, have increased the amount of the Delaware trust fund, held by the United States "for the benefit of the Delaware people," by the principal amount of the Indian Claims Commission Award. J.S. App. 45a. Thus, it reasons, each "just proportion" share to be received by Delawares electing American citizenship in 1866 would have been greater. The court then said, as we read its opinion, that any act of Congress distributing the award that does not afford the some 700 alien claimants per capita shares, equal to the per capita shares the present individual Delawares receive, is unconstitutional. The majority ignored the fact that the ancestors of the claimants and the claimants have been solely Americans since 1866, and have accrued no rights *as Delawares* since that date, for they have been aliens to the tribes. If that fact is recognized, the alien claimants, assuming *arguendo* they were entitled to anything, would take only 70 distributive shares because they stand, under American law, *per stirpes* in the shoes of their 70 ancestors who renounced the Tribe. But what the court did, in prying the judiciary into a political matter, was first to evade the prohibition of suits against Indian sovereign bodies by the misuse of a class action to place a tribal asset in jeopardy. Having, by this improper device, intruded into a field which it should not have entered, the court was required to create and impose an ill-fitting melange of American equity and property concepts, mismated with Indian communal practices, to create continuing communal interests for the burgeoning alien claimants in tribal assets from 1866 onward, so that some 700 alien claimants would take 700

shares of a distribution fashioned as the court thinks it should be. And this is done in the name of an 1854 Treaty, a "primary object" of which was to "advance the interests and welfare of *the Delaware people*. . . ." Art. 15, 10 Stat. 1051, Attach. 7a (emphasis added). We have made this prefatory examination to show that judicial intrusion into political matters by evasion of the doctrine of sovereign immunity is not only wrong *per se,* but also does not necessarily produce either legally logical or sound social results.

Treaty commitments of the United States to the Delaware Indian Tribe as a political entity and its members underlie this controversy and control its resolution. The District Court felt that application of the treaties according to their plain terms would work an inequity and therefore, in effect, revised them. However, that matter is nonjusticiable because the courts cannot lawfully reform treaties. The Delaware treaties of 1854 and 1866 (and withdrawals from the Tribe under the latter) demonstrate conclusively that proceeds from the sale of Delaware land were to be paid, or held, solely for the benefit of "the Delaware people" and that the American expatriate Kansas "Delawares," voluntary political aliens to the Tribe since 1866, should not share in the distribution of Delaware tribal property because they have no legal relationship to the Tribe.

This Court has stated that the political question doctrine is a function of the constitutional separation of powers and that, accordingly, a case involves a political question where, *inter alia,* there is found a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*

v. Carr, 369 U.S. 186, 210, 217 (1962).[4] *See also Gilligan v. Morgan,* 413 U.S. 1 (1973).

The power to make treaties, including the power before 1871 to treat with the Indian tribes,[5] is committed under the Constitution to the President and Congress acting jointly. U. S. CONST. art. II, § 2, cl. 2. The supremacy clause makes binding on the judiciary all treaties so made. *Id.* art. VI, cl. 2. Although courts have the power to interpret treaties, *e.g., Kolovrat v. Oregon,* 366 U.S. 187, 194 (1961), it necessarily is limited by the powers vested in the political branches. The power to make treaties, as well as the correlative powers to break, reform, or determine the status of existing treaties, is political in nature. This Court thus has long held, in disputes involving the treaty

[4] A political question is involved and the case is dismissible for nonjusticiability where one or more of the following formulations is "inextricable from the case":

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

[5] Treaties of the United States with Indian tribes have equal status in law with treaties entered into with foreign states. *Morton v. Mancari,* 417 U.S. 535, 552 (1974); *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 242-43 (1872); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-60 (1832). In 1871, Congress foreclosed further treaties with Indian tribes, but left valid and unimpaired existing treaties. 25 U.S.C. § 71 (1970).

relations of the United States, that the courts are bound to adhere, even in the exercise of their interpretive powers, to the principles and constructions established by the political departments. *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 307, 309 (1829). *See also Lone Wolf v. Hitchcock,* 187 U.S. 553, 567-68 (1903).

Consequently, the judiciary cannot in any way annul, disregard, or amend provisions of existing treaties without doing violence to the constitutional separation of powers. *Doe v. Braden,* 57 U.S. (16 How.) 635, 657 (1853); *The Amiable Isabella,* 19 U.S. (6 Wheat.) 1, 71 (1821); *Osage Tribe of Indians v. United States,* 66 Ct. Cl. 64, 80-81 (1928), *cert. denied,* 279 U.S. 811 (1929). It is the duty of the courts to find the intentions of the treating parties and to administer the agreement according to its terms—it is not their province to remake history. *Doe v. Braden, supra,* at 657; *The Amiable Isabella, supra,* at 71; *see DeCoteau v. District County Court,* 420 U.S. 425, 447, 449 (1975).

The rights of modern Delawares and the rights of expatriated Kansas "Delawares," must be determined by the 1854 and 1866 treaties of this country with the Delaware Tribe. In those treaties lie the foundation of the special relationship of the United States to the Indian against which this controversy must be measured. *Morton v. Mancari,* 417 U.S. 535 (1974). The United States did not deal with individuals, but with tribes. *Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma,* 220 U.S. 481, 484 (1911). The claim which gave rise to the Indian Claims Commission judgment and award here was based on the violation of treaty

provisions prescribing public sale of tribal lands. J.S. App. 8a-9a. "A primary object of [the treaty was] to advance the interests and welfare of the Delaware people," and it provides clearly that payment for lands ceded thereunder was to be made to the Delaware Tribe. Treaty of May 6, 1854, arts. 15, 3, 10 Stat. 1051, 1049, Attach. 7a, 3a. All moneys arising from land sales pursuant to the Treaty were directed to be paid to the permanent fund of "the Delaware people" to be invested by the President and, from time to time, spent or distributed for the benefit of *"the Delaware people." Id.,* arts. 7, 8, 10 Stat. 1050, Attach. 5a (emphasis added). The plain meaning of the foregoing is that all revenue arising contemporaneously and in the future from the sales consummated pursuant to the 1854 Treaty belonged to the Delaware Tribe and its members and no others.

No other interpretation of the provisions is meaningful in view of the nature of the subject property. The lands sold in 1856-1857 were tribal lands, held communally without individualized rights of ownership, and the proceeds from sales of such lands likewise were tribal property. *Sizemore v. Brady,* 235 U.S. 441, 449 (1914); *Gritts v. Fisher,* 224 U.S. 640, 642 (1912); *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 307 (1902); *Eastern Band of Cherokee Indians v. United States,* 117 U.S. 288, 308 (1886); *Minnesota Chippewa Tribe v. United States,* 315 F.2d 906, 913 (Ct. Cl. 1963). An intent of the parties to treat such proceeds as the property of anyone but the tribe would have been incomprehensible, and the treaty must be interpreted as the Indians would have understood it. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970).

Articles III and IX of the Treaty of July 4, 1866 unambiguously describe the terms by which the original Kansas "Delawares" severed themselves from the Delaware Tribe, forever precluding their classification as "Delaware people" within the meaning of the 1854 Treaty. They clearly and specifically relinquished all future rights in the Tribe's property. 14 Stat. 794, 796, Attach. 16a-17a. The treaties themselves determine the absence of a right in the so-called Kansas "Delawares" to share in Delaware tribal property arising in the present day. *See Eastern Band of Cherokee Indians v. United States,* 117 U.S. 288, 309-12 (1886). That class finds itself distinctly outside the line of succession of tribal treaty rights of which the judgment fund at issue is clearly the culmination.[6]

Arguments below and the opinion of the majority of the District Court suggest that "but for" the treaty violation the Delaware tribal fund would have been greater in 1866 and that the Kansas "Delawares," then taking their *pro ratu* share of tribal assets, therefore, did not receive adequate consideration for their expatriation and severance of tribal rights. J.S. App. 45a. But this line of reasoning is based on speculation alone. Moreover, it ignores the fact that the electing Delawares made their bargain for a sum certain—their "just proportion . . . of the credits of said tribe . . . *then* held in trust by the United States . . . ." Art. IX, 14 Stat. 796, Attach. 16a (emphasis added). No Dela-

[6] Claims under the Indian Claims Commission Act are tribal claims and funds arising from judgments on such claims are regarded as tribal. *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States,* 512 F.2d 1390, 1392 (Ct. Cl. 1975); *Minnesota Chippewa Tribe v. United States,* 315 F.2d 906, 913 (Ct. Cl. 1963).

ware then knew of a judgment to be rendered 103 years in the future.

The foregoing construction of the Delaware treaties is, moreover, the one adopted and acted upon by the legislative and executive branches of Government. Congress in 1904 recognized the Delaware Tribe as successor to the interests created by the 1854 Treaty. Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222, Attach. 22a. The issue of the eligibility of the Kansas "Delawares" to share in Delaware property, derived in part from that Treaty, arose and was decided conclusively against them at that time by the Comptroller of the Treasury, the Secretary of the Interior, the Attorney General, and the Delaware General Council on the basis of their dissolution of tribal relations. 11 COMP. DEC. 496, 500-01 (1905); see discussion at pp. 9-10, *supra*. The Government's distribution of judgment funds to the Tribe thereafter consciously excluded appellees' ancestors as non-Delawares. Such conclusive action by the political branches of Government constitutes a construction of the 1854 and 1866 treaties which is binding on the courts. *Baker v. Carr,* 369 U.S. 186, 212 (1962); *Charlton v. Kelly,* 229 U.S. 447, 474-76 (1913); *Terlinden v. Ames,* 184 U.S. 270, 285-88 (1902); *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 309 (1829).

Nevertheless, the majority below effectively ignored the plain language and intent of material provisions of the treaties and thereby reformed or amended those agreements in order to embrace a legally alien class within the tribal sphere as a function of equal protection of law. In addressing the issue of justiciability, the majority stated that the authority conferred by the

Constitution on the political branches to deal with Indian tribes by treaty was involved only "indirectly" as a historical background to the present controversy. J.S. App. 25a. Their decision thus holds the treaties by which the Delaware claim and award arose as only marginally relevant to the resulting distribution. Such relegation of treaties to the status of "background" is wholly mistaken where the jurisdiction of the Commission and the very nature of the undertaking to resolve Indian claims is premised upon the existence of U. S. treaty obligations.[7]

Likewise, the majority finds that the language of Article IX of the 1866 Treaty, clearly providing on its face that the election of expatriation foreclosed all future right to share in Delaware property, nevertheless did not impel an interpretation that this election

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[7] The Indian Claims Commission is empowered to hear and determine on behalf of any Indian tribe, band, or identifiable group of American Indians:

> (1) claims in law or equity arising under the Constitution, laws, *treaties* of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) *claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant;* and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

25 U.S.C. § 70a (1970) (emphasis added).

constituted a waiver of rights in future judgments.[8] J.S. App. 45a. Such disregard for unequivocal expressions of the parties' intent embodied in existing treaties is untenable. Abrogation of Indian treaty rights is not to be so lightly inferred by the courts. *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-13 (1968); *United States v. Washington,* 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied,* 96 S.Ct. 877 (1976).

The result reached by the District Court is not possible without a constitutionally impermissible exercise in treaty reform, and the controversy, therefore, is political and nonjusticiable. The complaints should have been dismissed.

II. The Distribution of the Indian Claims Commission Award Exclusively to the Federally Recognized Delaware Tribes and Their Members Does Not Deny Due Process of Law to Americans Who Are Descendants of Delaware Indians Who Voluntarily Dissolved Their Relations with the Tribe More than a Century Ago.

A. IF THE MATTER BE DEEMED JUSTICIABLE, THE "RELATIVELY RELAXED" STANDARD OF RATIONALITY IS TO BE APPLIED IN DECIDING WHETHER THE CLASSIFICATION OF DISTRIBUTION TO TRIBAL ENTITIES AND THEIR MEMBERS OFFENDED DUE PROCESS OF LAW.

The District Court, having held that the case was justiciable, decided that the distribution statute denied due process of law because, so it believed, it was irra-

[8] The majority prefers to construe the Treaty liberally in accord with the familiar canon calling for resolution in treaty interpretation in favor of the "weak and defenseless" Indian. This Court recently found this canon inapplicable where parties on both sides of the issue were Indian. *Northern Cheyenne Tribe v. Hollowbreast,* 96 S.Ct. 1793, 1797 n.7 (1976).

tional to exclude American citizens who have no political connection with the Delaware Tribe but are of some degree of Delaware descent from the Tribe of 1854. The District Court announced the test of rationality, but really departed from it in imposing its notions of "equity" in the face of facts showing a clear distinction between the classes included in, and those excluded from, the distribution.

The test of rationality for the determination of the constitutional validity of legislative distinctions and classifications is a "relatively relaxed" one. *Massachusetts Board of Retirement v. Murgia,* 96 S.Ct. 2562, 2567 (1976). We believe it is apparent that the majority erred in concluding that the Government did not have a legitimate interest in legislating specially on behalf of Indian tribes and their citizens and erred also in holding that persons who have no legal connection whatsoever with the Delaware Tribe stand on "equal footing" as to tribal matters with the Tribes and their members.

That the Government has a legitimate interest in preferring Indian tribal members to others in matters pertaining to Indian affairs is established by *Morton v. Mancari,* 417 U.S. 535 (1974). In *Mancari,* a congressional determination to extend Bureau of Indian Affairs hiring preferences to Indian tribal members was unanimously upheld against a fifth amendment challenge. The Court analyzed the preference in the "historical and legal context," *id.* at 553, of the "unique legal status of Indian tribes under federal law and . . . the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes," *id.* at 551. The Court held that since preference for tribal Indians in BIA employment could be

"tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments [would] not be disturbed." *Id.* at 555. *See also Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 96 S.Ct. 1634, 1644 (1976).

The conclusion that descendants of persons who were Delaware citizens in 1856-1857 (the time of the wrong) but renounced that citizenship in 1866 now stand on an "equal footing" with the Tribes and their members can be reached only by ignoring treaties, Indian law, and the existence of the Tribes and substituting therefor the general concepts (a) that the "rationality" of a law is to be determined by what Congress said about it rather than by objective perception of how it operates, (b) that the 1854 Delawares held their property, real and personal, as tenants in common on a per capita basis rather than communally as a Tribe, and (c) that the approximately 700 alien claimants, J.S. App. 4a n.3, stand, not *per stirpes,* in the shoes of their 70 ancestors of 1866, but on per capita parity with present tribal members.

At this writing, we have seen an advance draft of the brief to be filed by the Solicitor General in No. 75-1495. In the interest of conserving the Court's time, we do not repeat, but adopt, the arguments as to rationality therein made as well as those of the minority opinion below. Those documents succinctly answer all claims of lack of rationality, but we think it important here to meet the argument that since Congress apparently was not aware of, or did not have specifically called to its attention, the probable existence of descendants of such alien descendants, their exclusion from distribution was irrational. We suggest this is a *non-sequitur.*

Determination of the validity of a legislative classification is not determined by what the Legislature says in considering the legislation, but by objective standards. "Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to *or perceived by the courts.*" *United States v. Maryland Savings-Share Ins. Corp.,* 400 U.S. 4, 6 (1970) (emphasis added). And at last term this Court said that if a rule excluding aliens from Civil Service employment was expressly mandated by Congress the Court "might *presume* that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Hampton v. Mow Sun Wong,* 96 S.Ct. 1895, 1905 (1976) (emphasis added). Tested under the foregoing rules, the oversight, if it was an oversight, or failure of Congress or some of the proponents of the distribution statute to identify these particular Delaware descendants, would not invalidate the statute. for the widest legal and social differences exist between them and Delaware citizens. Congress was attempting to rectify a breach of a treaty made for the benefit of "the Delaware people." The wide distinction between present "Delaware people" and tribal aliens of some degree of Delaware blood who had been so absorbed in the general citizenry in more than 100 years as to be lost to Indians is clear evidence that these alien descendants no longer were generally regarded as Indians or took part in Indian affairs and were not "considered 'Indians' by the community in which [they live]." *Cf.* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (U. N.Mex. ed. 1942).

B. Distribution of Treaty Judgment Funds to Federally Recognized Tribes and Tribal Members, by the Use of Established Rolls, Rationally Furthers the Obligation of the Federal Government Toward the Indian Tribes.

In *Morton v. Mancari,* 417 U.S. 535 (1974), this Court noted the Government's "trust obligation toward the Indian tribes"[9] and held that an equal protection challenge to legislation that prefers tribal Indians can be analyzed only with considerable deference to the unique relationship between the federal government and tribal Indians, the unique legal status of Indian tribes, and the plenary power of Congress to legislate on behalf of federally recognized Indian tribes. 417 U.S. at 550, 551. The constitutionality of the preference for the Delaware Tribe and Absentee Delaware Tribe can only be considered in this same historical and legal context. 417 U.S. at 553; *see Mathews v. Diaz,* 96 S.Ct. 1883 (1976); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 96 S.Ct. 1634, 1644 (1976).

Indian land is tribal property held by the community for the common benefit of its members; individuals hold no vested rights therein. *United States v. Jim,* 409 U.S. 80, 82 (1972); *Sizemore v. Brady,* 235 U.S. 441, 446, 449 (1914). Accordingly, the Government has never dealt with individual Indians, but only with tribes, and individual Indians enjoy no rights under treaties. *Sac and Fox Indians of the Mississippi in*

[9] 417 U.S. at 541-42. The Court noted that this preference was enacted as part of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* (1970), which also had as its "overriding purpose" the advancement and benefit of Indian tribes and tribal members. *See* 417 U.S. at 542. *See also Fisher v. District Court,* 96 S.Ct. 943, 946 (1976).

Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma, 220 U.S. 481 (1911). The Delaware land sold to the Government in 1854 was tribal property.

This is why the Court of Claims has always held that the ancestral tribe, not the individual lineal descendants of the tribe on a per capita basis, "owned" the claim presented to the Indian Claims Commission. *Turtle Mountain Band of Chippewa Indians v. United States,* 490 F.2d 935, 954 (Ct. Cl. 1974). Thus, since the award in this case supplements the amount paid or put in trust for the Tribe under the 1854 Treaty and settles a tribally owned claim, the award is tribal property. In *Quick Bear v. Leupp,* 210 U.S. 50 (1908), this Court established that the distribution by Congress of such a treaty fund was not a "gratuitous appropriation of public moneys," *id.* at 80, but rather, was an expenditure of "moneys belonging really to the Indians," *id.* at 81.

In exercising its plenary power to administer tribal property, *e.g., Tiger v. Western Investment Co.,* 221 U.S. 286, 311 (1911), Congress enjoys the unquestioned right to specify those who are tribal members for purposes of the distribution of funds, provided they have a relationship to the tribe. *Sizemore v. Brady,* 235 U.S. 441, 447 (1914); *Simmons v. Eagle Seelatsee,* 244 F. Supp. 808, 813 (E.D. Wash. 1965), *aff'd mem.,* 384 U.S. 209 (1966).[10] Congress in this case decided

[10] Congress also may exercise this plenary power to administer tribal property in order to use distribution of judgment funds to effect its national Indian policy or its policy toward specific tribes. *See* F. Cohen, Handbook of Federal Indian Law 341 (U. N.Mex. ed. 1942). For example, it has barred per capita payments from judgments where it wished to restore the tribal estate, *id.; see* Act of Mar. 3, 1931, ch. 401, § 6, 46 Stat. 1487; imposed blood requirements where it wanted to restrict recovery

to follow the usual rule and distribute this tribal property only to the tribes and tribal members and to exclude those who had terminated their tribal membership. *Halbert v. United States,* 283 U.S. 753, 762-63 (1931); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 98-99 (U. N.Mex. ed. 1942).

The Court of Claims has continuously declared that Congress has full power under the Indian Claims Commission Act to decide, under varying circumstances, whether descendants of tribal members at the time of the wrong but who are not currently tribal members should be entitled to participate in any award. *Cherokee Freedmen v. United States,* 195 Ct. Cl. 39, 51 (1971); *Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians,* 355 F.2d 936, 944 (Ct. Cl. 1965). Congress has distributed the vast majority of Indian Claims Commission awards only to the tribes or tribal members.[11]

among certain tribal groups, 25 U.S.C. § 1262 (Supp. IV, 1974); *see Azure v. Morton,* 514 F.2d 897 (9th Cir. 1975); and restricted distribution only to enrolled tribal members, *e.g.,* 25 U.S.C. § 1300e-1 (Supp. IV, 1974). The latter mode of distribution accords with the prevailing federal policy of strengthening Indian tribes and tribal self-government. *See Bryan v. Itasca County,* 96 S.Ct. 2102, 2111 n.14 (1976); *Morton v. Mancari,* 417 U.S. 535, 542 (1974); *see e.g.,* Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* (Supp. IV, 1974).

[11] Congress has used four basic distribution plans, examples of which are set forth below.

In the following statutes distribution was made to the tribal governing body to be spent or invested for purposes authorized by that body (including, at its discretion, per capita distribution) and approved by the Secretary of the Interior:

25 U.S.C. § 594 (1970) (Minnesota Chippewa; any per capita distribution limited to descendants of certain bands who meet requirements of membership in tribe); 25 U.S.C. §§ 647-49 (1970) (Hualapai, unexpended balance); 25 U.S.C. § 676a (1970) (Ute Indians of Utah); 25 U.S.C. § 690 (1970) (Red Lake Chippewa); 25 U.S.C. §§ 786-87 (1970) (Creek, unpaid balance); 25 U.S.C. §§ 881-81a (1970) (Potawatomi); 25 U.S.C. §§ 882-82a (1970) (Sac and Fox); 25 U.S.C. §§ 1031-38 (1970) (Absentee and Eastern Shawnee, distribution to Cherokee-Shawnee based on descent from 1889 tribal roll); 25 U.S.C. §§ 1081-88 (1970) (Quileute and Hoh, unexpended balance); 25 U.S.C. § 1112 (1970) (Miami of Oklahoma, per capita only to enrolled members); 25 U.S.C. §§ 1141-47 (1970) (Oneida, Stockbridge-Munsee, per capita to enrolled Brotherton Indians); 25 U.S.C. § 1171 (1970) (Iowas, any per capita distribution only to those who meet membership requirements); 25 U.S.C. §§ 1271-74 (Supp. IV, 1974) (Jicarilla Apache); 25 U.S.C. §§ 1281-84 (Supp. IV, 1974) (Havasupai); 25 U.S.C. §§ 1300-1300a-4 (Supp. IV, 1974) (Yavapai Apache).

The following statutes prescribe distribution to enrolled members of the modern tribe or persons eligible for enrollment:

25 U.S.C. §§ 565-65g (1970) (Klamath); 25 U.S.C. §§ 581-90c (Supp. IV, 1974) (various Shoshone tribes, also use of historical rolls for Northwestern Band and blood quantum requirements); 25 U.S.C. §§ 1071-73 (Supp. IV, 1974) (Colville); 25 U.S.C. §§ 1161-67 (1970) (Cheyenne-Arapaho); 25 U.S.C. §§ 1191-95 (1970) (Umatilla, various modern membership rolls or eligible for membership); 25 U.S.C. §§ 1201-05 (1970) (Fort Peck Sioux); 25 U.S.C. §§ 1261-65 (Supp. IV, 1974) (Blackfeet, enrolled members; Gros Ventre, membership plus descent from 1937 payment roll and blood requirement); 25 U.S.C. §§ 1300b-1300b-5 (Supp. IV, 1974) (Kickapoo); 25 U.S.C. §§ 1300c-1300c-5 (Supp. IV, 1974) (Yankton Sioux, all who meet membership requirements under 1932 constitution); 25 U.S.C. §§ 1300e-1300e-7 (Supp. IV, 1974) (Assiniboine, enrolled members plus requirements of tribal lineage and blood). Many of the foregoing statutes provide for distribution of up to 25 percent of the fund to the tribe.

The following statutes prescribe distribution to persons who can trace lineal descent from existing "ancient" rolls:

25 U.S.C. §§ 788a-88h (1970) (Creek, various rolls); 25 U.S.C. §§ 871-75 (1970) (Otoe and Missouria, 1906 and 1907 allotment

The crucial fact in this case is that the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma are federally recognized Indian

tribes functioning under governments approved by the Department of the Interior. App. 101-06; J.S. App. 18a-19a n.20. Since the tribal organization of the Delaware Tribe has remained intact, see discussion at pp. 7-9, *supra,* and has been recognized by the political departments of the Government as existing, "they are 'a people distinct from others' . . . ." *The Kansas Indians,* 72 U.S. (5 Wall.) 737, 755 (1867).

In passing the questioned distribution statute, Congress simply followed the Comptroller General's much earlier decision which had excluded these Kansas "Delawares' " ancestors from participation in an appro-

rolls); 25 U.S.C. §§ 883-83d (Supp. IV, 1974) (Osage, 1908 tribal roll, $1 million to the tribe); 25 U.S.C. §§ 911-14 (1970) (Quapaw, 1890 tribal roll but adopted members excluded); 25 U.S.C. §§ 961-67d (1970) (Omaha, 1882 and 1893 allotment rolls plus blood quantum requirement and exclusion of members of other tribes); 25 U.S.C. §§ 991-98 (1970) (Cherokee, 1907 tribal roll); 25 U.S.C. §§ 1051-55 (1970) (Tillamook, 1898 census roll or 1914 annuity payment roll); 25 U.S.C. §§ 1111-21 (1970) (Miami tribes of Indiana and Oklahoma, 1895, 1889, and 1891 tribal rolls; section 1112 provides for distribution to enrolled members only); 25 U.S.C. §§ 1221-27 (1970) (Weas, Piankashaws, Peorias and Kaskaskias, various rolls from 1854 to 1956).

For examples of statutes in which distribution is based solely on descent from a tribe as constituted on a certain date ("catch-all" eligibility) see:

25 U.S.C. §§ 1011-15 (1970) (Snake or Paiute of Oregon, descent from bands whose chiefs signed treaty as long as there is no recovery under other Paiute judgments); 25 U.S.C. §§ 1101-05 (1970) (Nooksack); 25 U.S.C. §§ 1131-35 (1970) (Duwamish); 25 U.S.C. §§ 1151-55 (1970) (Chehalis); 25 U.S.C. §§ 1231-36 (1970) (Chemehuevi); 25 U.S.C. §§ 1241-48 (Supp. IV, 1974) (Pembina Chippewa, excluding members of current Red Lake tribe or those who participated in other awards); 25 U.S.C. §§ 1300d-1300d-9 (Supp. IV, 1974) (Mississippi Sioux Tribes, but distribution to Flandreau Santee Sioux and Santee Sioux of Nebraska based solely on tribal membership).

priation to the Delaware Nation for a settlement under the identical 1854 Treaty. Congress also followed the rule laid down by this Court in *Eastern Band of Cherokee Indians v. United States,* 117 U.S. 288 (1886). There the Court held, among other things, that the Eastern Band's claim to a share of a commuted annuity fund created by the 1835 Treaty of New Echota with the Cherokee Nation had "no substantial foundation." *Id.* at 311. In this treaty, the Cherokees had ceded to the United States all land owned by them east of the Mississippi River and had agreed to remove west of the River. *Id.* at 301. The Cherokees further agreed to commute their permanent annuity to $214,000, to be invested by the United States as part of the general fund of the nation. *Id.* at 302. The New Echota Treaty contained a provision similar to Article IX of the 1866 Delaware Treaty, whereby Cherokees could refuse to remove and become citizens of their state of residence. *Id.* The Cherokees who so elected were the claimants who comprised the so-called Eastern Band.

This Court found the effect of the individuals' decision to remain behind to be clear: "They ceased to be part of the Cherokee Nation. . . ." *Id.* at 303, 309. Thus, it was held, the Eastern Band had no share in the $214,000 commuted annuity fund, even though they had been members of the tribe at the time the fund was created. *Id.* at 311. In reaching this result, this Court relied upon the basic precepts of federal Indian law:

> If Indians . . . in any . . . State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be readmitted to citi-

> zenship as there provided. They cannot live out of its Territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the Nation. Those funds . . . were dedicated by the constitution of the Cherokees, and were intended by the Treaties with the United States, for the benefit of the united Nation, and not in any respect for those who had separated from it and become aliens to their Nation.

Id. at 311-12. These established principles certainly furnish a rational basis for what was done here.

The District Court here questioned the utilization of the existing 1906 and 1940 Delaware rolls as a mechanism for determining tribal membership and participation in the fund. But the 1906 roll on which appellants' eligibility is based has long constituted the measure of Delaware citizenship. That roll was compiled on the basis of the 1867 registration of all Delawares who removed to Oklahoma pursuant to the 1866 Treaty and now provides the best measure of continuity between the Tribe as it existed in 1854 and as it exists today.

Moreover, congressional power to use available tribal rolls for administrative convenience and avoidance of spurious claims is well-settled. In *United States v. Ferguson,* 247 U.S. 175 (1918), this Court held that Congress, for the purpose of restricting alienation of allotments, could declare that the quantum of Indian blood possessed by members of certain tribes be determined by tribal rolls and that any other evidence was inadmissible. Such rolls were found to be "fixed, easily accessible and reasonably reliable . . . ." *Id.* at 178.

This is a case of administrative workability. Congress knew that its 1968 distribution statute has not

yet been executed because of a flood of often erroneous and sometimes fraudulent lineal descendancy claims.

The District Court argued that the statutory criteria were imperfect: Since the Cherokee and Absentee Delawares were required to trace their descendancy to the 1906 and 1940 rolls, respectively, (and, in the case of the Absentee Delawares, to show they were eligible to be on the 1940 roll), administrative convenience and the avoidance of spurious claims were not really furthered. All three classes were "exactly the same." J.S. App. 35a-39a. However, it is reasonable to conclude, as Congress did, that, although perhaps not error-free, it would be far easier and more reliable to require recipients to trace their descendancy to a 32-year-old roll and to a 66-year-old roll than to a Tribe as it existed 118 years ago and which had no contemporaneous tribal roll. The decision reached by Congress was certainly rational. As this Court recognized only last Term, "[p]erfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Board of Retirement v. Murgia,* 96 S.Ct. 2562, 2567 (1976). *See also Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

This Court has recognized that administrative convenience and protection against spurious claims are legitimate governmental interests. *E.g., Weinberger v. Salfi,* 422 U.S. 749 (1975). In *Salfi,* the Social Security Act's exclusion of surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months before his death was held not to violate the equal protection guarantee incorporated in the fifth amendment. *Id.* at 768. As in *Salfi,* the so-called Kansas "Delawares" assert a noncontractual claim which enjoys no consti-

tutionally protected status.[12] *Id.* at 771-72. As articulated by this Court, "[t]he question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.* at 777. *See also Mathews v. Lucas,* 44 U.S.L.W. 5139, 5143 (U.S. June 29, 1976); *Massachusetts Bd. of Retirement v. Murgia,* 96 S.Ct. 2562, 2568 (1976). In view of the chaos caused by the often fraudulent claims which poured into the Bureau of Indian Affairs to claim under the lineal descendancy "catchall" provision in the 1968 Act and because distribution of the earlier judgment fund is not even foreseeable, an appropriate case calling for reasonable governmental restrictions on the ability to share in the judgment is apparent. *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

C. The Legislative History of the Statute at Issue Reflects a Clear Congressional Decision To Exclude Descendants from Members of the Tribe at the Time of Injury Who Are Not Members of the Delaware or Absentee Delaware Tribes.

Congress knowingly excluded nontribal descendants of members of the Tribe as it existed at the time of the wrong. Congress knew that Indian Claims Commission distributions required a basic "policy" decision:

[12] The District Court correctly held that the so-called Kansas "Delawares" have no property or vested right in the Indian Claims Commission award distributed in 25 U.S.C. §§ 1291-97. J.S. App. 61a-62a.

Whether it was preferable to divide the judgment fund among all descendants from members of the 1854 ancestral tribe or to restrict distribution to the modern tribal entity or entities which have succeeded to the ancestral entity's claim and the members thereof. Thus witness the following colloquy between Congressman Edmondson, who had introduced the bill in its original form (H.R. 5200, which included a lineal descendancy "catchall" clause) and later in revised form (H.R. 14267, which eliminated the "catchall"), and Louis Rochmes, attorney for the Delaware Tribe:

> Rep. Edmondson: * * * The [Indian Claims Commission] awards have to be made to the tribal entity or entities, but the Congress must decide how those awards are distributed.
>
> Mr. Rochmes: That is correct, Mr. Chairman.
>
> Rep. Edmondson: And that is a totally different question.
>
> Mr. Rochmes: That is correct. The Congress must decide as a matter of policy. And Congress may say, we will give the award to the lineal descendants of the group.
>
> Rep. Edmondson: And has it often done it that way?
>
> Mr. Rochmes: Has it often—I don't think you have always done it.
>
> Rep. Edmondson: I agree, it has been both ways.

Hearings on H.R. 5200 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 47 (Mar. 13, 1972) (unpublished) [hereinafter cited as *House Hearings*].

Not only did Congress understand the choice it had to make, but also it was sympathetic to the request of

the Delaware and Absentee Delaware Tribes that a portion of the funds be retained for advancement of their members. See the following colloquy:

> Rep. Edmondson: The thing you are interested in is money that can be used for your tribe, for Delawares and the Western Oklahoma Delawares? So that money will be available for educational purposes?
>
> Mr. Townsend [Chairman, Delaware Tribal Business Committee]: Yes, Sir.
>
> Rep. Edmondson: And the purposes of small business?
>
> Mr. Townsend: Yes.
>
> Rep. Edmondson: This is the point you were making?
>
> Mr. Townsend: I conferred with Senator Bellmon yesterday . . . and he mentioned the Alaska Native's bill which they have similar to this . . . . *House Hearings,* at 34.

Congressman Camp voiced this identical theme: "I think it has been expressed by me before the Subcommittee . . . that I feel that one of the most important things we need to do with the distribution of these funds back to our tribes is to retain a portion of them for education particularly, and small business loans, and things of this type whereby that money will be used for this particular benefit. . . . " *Id.* at 39.

Congress knew that the judgment fund distribution enacted four years earlier and ordering distribution to lineal descendants still had not been completed, *e.g., House Hearings,* at 3, and that the Tribes had been injured by this failure, *e.g., House Hearings,* at 9, 16. Congress simply did not believe that all lineal descendants from members of the injured Tribe could be included without occasioning significant administrative burdens.

> Mr. Robert Bruce [of the U.S. Department of Interior]: [W]e want those Munsees or Delawares who can prove their descendancy from the time of the treaties and the wrong at the time of the treaties—they should be given the opportunity to . . . prove that they were there and that they are lineal descendants. Then we believe from our research that there are a few of these people. . . .
>
> Rep. Edmondson: I have a feeling that the language that you proposed that would exclude only those persons whose Delaware ancestry is derived solely from a person who severed his affiliation with the Delaware Nation prior to 1854 is going to present some real administrative problems. *House Hearings,* at 138-39.

Indeed, the very fact that the Kansas "Delawares" were not mentioned in the legislative history indicates only that they long ago renounced the Tribe and have not been remembered. There is no group, organized or otherwise, known as the Kansas "Delawares." There are only individuals who have long become lost in the general citizenry. Their names would not be associated with the Tribe because they have done nothing for the Tribe. A review of the proceedings before the Indian Claims Commission and the Court of Claims would not reveal the name, because the Kansas "Delawares" never appeared in the 25 years of litigation which led to this judgment fund, or in any other litigation affecting the Delawares. Nor have the Kansas "Delawares" ever petitioned Congress in connection with this or any other distribution statute. The Kansas "Delawares" were never heard of or heard from in modern times until they filed suit in 1973, when the chance of obtaining a cash windfall appeared.

The case of the Kansas "Delawares" would present Congress with no special problem. They are simply in the relatively small class of U.S. citizens who can trace some ancestry to the 1856-1857 Delaware Tribe, but who are not tribal members.

CONCLUSION

We respectfully pray that this Court reverse the judgment below and remand the case to the District Court with directions to dismiss the cases.

Respectfully submitted,

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ATTACHMENT

PRINCIPAL TREATIES AND STATUTES

Treaty of May 6, 1854, 10 Stat. 1048

Franklin Pierce,

President of the United States of America:

May 6, 1854

To All and Singular to Whom These Presents Shall Come, Greeting:

Whereas a Treaty was made and concluded at the City of Washington, on the sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-con-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Cha[illegible]s Journeycake; Que-sha-to-wha, or John Ketchem; Pendoxey, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner; they being thereto duly authorized by said tribe; which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded at the City of Washington this sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-con-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Charles Journeycake; Que-sha-to-wha, or John Ketchem; Pondoxy, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner, they being thereto duly authorized by said tribe:

Article 1. The Delaware tribe of Indians hereby cede, relinquish, and quitclaim to the United States, all their right, title, and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, which is described in the

article supplementary to the treaty of October third, one thousand eight hundred and eighteen, concluded, in part, on the twenty-fourth September, one thousand eight hundred and twenty-nine, at Council Camp, on James' fork of White river, in the State of Missouri; and finally concluded at Council Camp, in the fork of the Kansas and Missouri rivers, on the nineteenth October, one thousand eight hundred and twenty-nine; and also their right, title, and interest in and to the "outlet" mentioned and described in said supplementary article; excepting that portion of said country sold to the Wyandot tribe of Indians, by instrument sanctioned by act of Congress, approved July twenty-fifth, one thousand eight hundred and forty-eight, and also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the half-breed Kanzas, forty miles, in a direct line, west of the boundary between the Delawares and Wyandots thence north ten miles, thence in an easterly course to a point on the south bank of Big Island creek, which shall also be on the bank of the Missouri river where the usual high-water line of said creek intersects the high-water line of said river.

ARTICLE 2. The United States hereby agreed to have the ceded country (excepting the said "outlet") surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed—such survey to be commenced and prosecuted as the President of the United States may deem best. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of the public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry, in the same manner that private entries are made of United States

lands; and any, or all, of such lands as remain unsold, after being three years subject to private entry, at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

ARTICLE 3. The United States agree to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release, and quitclaim to the United States, the said tract of country hereinbefore described as the "outlet." And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing, and selling the same.

ARTICLE 4. The Delaware Indians have now, by treaty stipulation, the following permanent annuities, to wit: one thousand dollars per fourth article of the treaty of third August, one thousand seven hundred and ninety-five. Five hundred dollars, per third article of the treaty of thirtieth of September, one thousand eight hundred and nine. Four thousand dollars per fifth article of the treaty of the third October, one thousand eight hundred and eighteen. One thousand dollars per supplemental treaty of twenty-fourth September, one thousand eight hundred and twenty-nine. One hundred dollars for salt annuity, per third article of the treaty of June seventh, one thousand eight hundred and three. Nine hundred and forty dollars, for blacksmith annuity, per sixth article of the treaty of third October, one thousand eight hundred and eighteen. All which several permanent annuities they hereby relinquish and forever absolve the United States from the further payment thereof; in consideration whereof the United States agree to pay

to them, under the direction of the President, the sum of one hundred and forty-eight thousand dollars, as follows: seventy-four thousand dollars in the month of October, one thousand eight hundred and fifty-four, and seventy-four thousand dollars in the month of October, one thousand eight hundred and fifty-five. The object of converting the permanent annuities into these two payments being to aid the Delawares in making improvements on their present farms, and opening new ones on the land reserved, building houses, buying necessary household furniture, stock, and farming utensils, and such other articles as may be necessary to their comfort.

ARTICLE 5. It is agreed that the sum of forty-six thousand and eighty dollars, being the value of the thirty-six sections of land set apart for school purposes by the supplemental treaty of one thousand eight hundred and twenty-nine, remain for the present at five per cent, interest, as stipulated by the resolution of the Senate of the nineteenth January, one thousand eight hundred and thirty-eight.

ARTICLE 6. The Delawares feel now, as heretofore, grateful to their old chiefs for their long and faithful services. In former treaties, when their means were scanty, they provided, by small life-annuities, for the wants of these chiefs, some of whom are now receiving them. These chiefs are poor, and the Delawares believe it their duty to keep them from want in their old and declining age. It is the wish of the Delawares, and hereby stipulated and agreed, that the sum of ten thousand dollars, the amount provided in the third article as a consideration for the "outlet," shall be paid to their five chiefs, to wit: Captain Ketchem, Sarkoxey, Segondyne, Neconhecond, and Kock-ka-to-wha, in equal shares of two thousand dollars each, to be paid as follows: to each of said chiefs, annually, the sum of two hundred and fifty dollars, until the whole sum is paid: *Provided*, That if any one or more of said chiefs die before the whole or any part of the sum is paid, the annual payments remaining to his share shall be paid to his male chil-

dren, and in default of male heirs, then to the legal representatives of such deceased chief or chiefs; and it is understood that the small life-annuities stipulated for by former treaties, shall be paid as directed by said treaties.

ARTICLE 7. It is expected that the amount of moneys arising from the sales herein provided for, will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary.

ARTICLE 8. As the annual receipts from the sales of the lands cannot now be determined, it is agreed that the whole subject be referred to the judgment of the President, who may, from time to time, prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment, also how much shall be invested, and in distributing the funds to the people, due regard and encouragement shall be given to that portion of the Delawares who are competent to manage their own affairs, and who know and appreciate the value of money; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

ARTICLE 9. The debts of Indians, contracted in their private dealings as individuals, whether to traders or otherwise, shall not be paid from the general fund.

ARTICLE 10. The Delawares promise to renew their efforts to suppress the introduction and the use of ardent spirits in their country and among their people, and to encourage industry, integrity, and virtue, so that every one may become civilized, and, as many now are, competent to manage their business affairs; but should some of them, unfortunately continue to refuse to labor, and remain or become dissipated and worthless, it shall be discretionary with the President to give such direction to the portion of funds, from time to time, due to such persons, as will prevent them from squandering the same, and secure the benefit thereof to their families.

ARTICLE 11. At any time hereafter when the Delawares desire it, and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe: *Provided,* such assignment shall be uniform.

ARTICLE 12. In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law, shall have a right of way through the reserved lands, on the same terms that the law provides for their location through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right of way, on payment of a just compensation therefor in money.

ARTICLE 13. The Christian Indians live in the country herein ceded, and have some improvements. They desire to remain where they are, and the Delawares are willing, provided the Christian Indians can pay them for the land. It is therefore agreed that there shall be confirmed by patent to the said Christian Indians, subject to such restrictions as Congress may provide, a quantity of land equal to four

sections, to be selected in a body from the surveyed lands, and to include their present improvements: *Provided,* The said Christian Indians, or the United States for them, pay to the Secretary of the Interior for the use of the Delaware Indians, within one year from the date of the ratification of this treaty, the sum of two dollars and fifty cents per acre therefor: *And provided further,* That the provisions of article twelve, in relation to roads, highways, and railroads, shall be applicable to the land thus granted to the Christian Indians.

ARTICLE 14. The Delawares acknowledge their dependence on the government of the United States, and invoke its protection and care. They desire to be protected from depredations and injuries of every kind, and to live at peace with all the Indian tribes; and they promise to abstain from war, and to commit no depredations on either citizens or Indians; and if, unhappily, any difficulty should arise, they will at all times, as far as they are able, comply with the law in such cases made and provided, as they will expect to be protected and their rights vindicated by it, when they are injured.

ARTICLE 15. A primary object of this instrument being to advance the interests and welfare of the Delaware people, it is agreed, that if it prove insufficient to effect these ends, from causes which cannot now be foreseen, Congress may hereafter make such further provision, by law, not inconsistent herewith, as experience may prove to be necessary to promote the interests, peace, and happiness of the Delaware people.

ARTICLE 16. It is agreed by the parties hereto, that the provisions of the act of Congress, approved third of March, one thousand eight hundred and seven, in relation to lands ceded to the United States, shall, so far as applicable, be extended to the lands herein ceded.

ARTICLE 17. It is further stipulated, that, should the Senate of the United States reject the thirteenth article

hereof, such rejection shall in no wise affect the validity of the other articles.

ARTICLE 18. This instrument shall be obligatory on the contracting parties as soon as the same shall be ratified by the President, and the Senate, of the United States.

In testimony whereof the said George W. Manypenny, commissioner as aforesaid, and the said delegates of the Delaware tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

GEORGE W. MANYPENNY, *Commissioner.* [L. S.]

SARCOXEY, his x mark.
NE-CON-HE-COND, his x mark. [L. S.]
KOCK-KA-TO-WHA, his x mark. [L. S.]
QUA-COR-NOW-HA, or James Segondyne, his x mark. [L. S.]
NE-SHA-TO-WHA, or John Ketchem, his x mark. [L. S.]
QUE-SHA-TO-WHA, or John Ketchem, his x mark.
PONDOXY, or George Bullet, his x mark. [L. S.]
KOCK-KOCK-QUAS, or James Ketchem. [L. S.]
AH-LAH-A-CHICK, or James Conner, his x mark. [L. S.]

Executed in the presence of:

THOS. JOHNSON.
CHARLES CALVERT.
DOUGLAS H. COOPER.
WM. B. WAUGH.
HENRY BEARD.
B. F. ROBINSON, *Indian Agent.*
HENRY TIBLOW, *U.S. Interpreter.*

And whereas the said Treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eleventh day of July, one

thousand eight hundred and fifty-four, ratify the same by a resolution in the words following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

July 11, 1854.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at the City of Washington this sixth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named delegates of the Delaware tribe of Indians, viz: Sarcoxey; Ne-hon-he-cond; Kock-ka-to-wha; Qua-cor-now-ha, or James Segondyne; Ne-sha-pa-na-cumin, or Charles Journeycake; Que-sha-to-wha, or John Ketchem; Pendoxey, or George Bullet; Kock-kock-quas, or James Ketchem; Ah-lah-a-chick, or James Conner; they being thereto duly authorized by said tribe.

Attest: ASBURY DICKINS, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eleventh day of July, one thousand eight hundred and fifty-four, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this seventeenth day of July in the year of our Lord one thousand eight [L. S.] hundred and fifty-four, and of the Independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State.*

Treaty of July 4, 1866, 14 Stat. 793.

Andrew Johnson,

President of the United States of America,

To All and Singular to Whom These Presents Shall Come, Greeting:

Whereas a treaty was made and concluded at the Delaware Agency, Kansas, on the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-six, by and between Thomas Murphy, John G. Pratt, and William H. Watson, Commissioners, on the part of the United States, and Captain John Connor, Captain Sarcoxie, Charles Journeycake, and other chiefs and councillors of the Delaware tribe of Indians, on the part of said tribe of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:—

Articles of Agreement between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

Whereas Congress has by law made it the duty of the President of the United States to provide by treaty for the removal of the Indian tribes from the State of Kansas; and whereas the Delaware Indians have expressed a wish to remove from their present reservation in said State to the Indian country, located between the States of Kansas and Texas; and whereas the United States have, by treaties negotiated with the Choctaws and Chickasaws, with the Creeks, and with the Seminoles, Indian tribes residing in said Indian country, acquired the right to locate other Indian tribes within the limits of the same; and whereas the Missouri River Railroad Company, a corporation existing in the State of Kansas by the laws thereof,—and which company has built a railroad con-

necting with the Pacific Railroad, from near the mouth of the Kaw River to Leavenworth, in aid of which road the Delawares, by treaty in eighteen hundred and sixty-four, agreed to dispose of their lands,—has expressed a desire to purchase the present Delaware Indian reservation in the said States, in a body, at a fair price:

It is hereby agreed between Thomas Murphy, superintendent of Indian affairs, John G. Pratt, agent for the Delawares, and William H. Watson, special commissioner, who are duly appointed to act for the United States; and Captain John Connor, Captain Sarcoxie, and Charles Journeycake, chiefs, and James Ketchum, James Connor, Andrew Miller, and John Sarcoxie, councillors, duly appointed and authorized by said Delaware Indians to act for them and in their behalf, to wit:—

Article I. That the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee, and Western Railroad Company, according to the terms of a treaty ratified August twenty-second, eighteen hundred and sixty, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof.

Article II. That the Secretary of the Interior shall be, and he is, authorized to sell to said Missouri River Railroad Company, or to other responsible party or parties, in a body, all the remaining part of said reservation, being the lands conveyed to said Delaware Indians in pursuance of the provisions of the supplemental treaty of September twenty-fourth, eighteen hundred and twenty-nine, and all other lands owned by the said tribe in the State of Kansas not previously disposed of, except as hereinafter provided, for a price not less than two dollars and fifty cents per acre, exclusive of improvements.

ARTICLE III. It shall be the duty of the Secretary of the Interior to give each of all the adult Delaware Indians who have received their proportion of land in severalty an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States: and the lands of all such Indians as may elect so to become citizens, together with those of their minor children, held by them in severalty, shall be reserved from the sale hereinbefore provided for. And the Secretary of the Interior shall cause any and all improvements made on any of the said lands, the sale of which is provided for, whether held in common or in severalty, to be appraised, and the value thereof added to the price of said lands, to be paid for when payment is made for the lands upon which said improvements exist; and the money received for the improvements on the land of each Indian held in severalty shall be paid to him at any time after its payment to the Secretary of the Interior, when the department shall be notified that said Indian is ready to remove to the Indian country, to provide for his removal to, and to enable him to make improvements on his new home therein: *Provided,* That whenever it shall be ascertained under the registry above provided for what lands will be vacated, there shall be set apart from the lands held in common, for each child of Delaware blood, born since the allotment of land to said tribe in severalty was made under previous treaties, a quantity of land equal to the amount to which they would have been entitled had they been born before said allotment, provided that selections for children belonging to families whose head may elect to remain may be made from lands which are to be vacated by those who elect to remove: *And provided further,* That in case there shall be improvements upon any heretofore allotted lands, so selected for children of the Delawares, payment shall be made for such improvements, at their appraised value, by the parents or guardians of said children, at

the same time as if the said lands had been sold to the railroad company or other parties.

ARTICLE IV. The United States agree to sell to the said Delaware Indians a tract of land ceded to the government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

ARTICLE V. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

ARTICLE VI. It is agreed that the proceeds of the sale of the Delaware lands herein provided for shall be paid to said Indians in the manner following, to wit: Whenever the Department of the Interior shall be notified by

the council, through the agent, that any of the Delawares who hold land in severalty are ready to remove, at the same time describing their allotments, there shall be paid to each such person the value of his allotment, and that of his family, to enable him to remove to and improve his new home, provided the money for the said allotment shall have been paid to the Secretary of the Interior; and while said money, or any part thereof, shall remain in the treasury of the United States, the Delawares shall be entitled to receive interest on the amount so retained at the rate of five (5) per cent per annum. And the residue of the proceeds of the sale of the Delaware lands, being those which have not been allotted, or which have once been allotted, but have been abandoned by the allottees, shall be added to the general fund of the Delawares, interest thereon to be paid to the Indians in the same manner as is now provided in regard to that fund.

Article VII. Within thirty days after the ratification of this treaty it shall be the duty of the Secretary of the Interior to give the said Missouri River Railroad Company notice that he is authorized to contract with them or other responsible party or parties for the sale of said lands on the terms specified in this treaty, indicating the approximate quantity thereof; and within twenty days after receiving said notice at their usual place of doing business in the State of Kansas it shall be competent for said company to elect to make the purchase, by filing with the said Secretary their bond, with approved security, in double the amount proposed to be paid by them for the whole of said lands, guaranteeing that they will purchase all of the lands to be sold under the provisions of this treaty, and that they will pay for them in accordance with the terms thereof. And upon the filing of a satisfactory bond as above provided by said company, the contract for such purchase shall be concluded by the said Secretary with said Missouri River Railroad Company, at not less

than two dollars and fifty cents per acre for the whole of the lands herein provided to be sold; *Provided, however,* That if said railroad company shall not within the twenty days above limited file its bond for the purchase as herein prescribed, the Secretary of the Interior may at the expiration of that time accept any offer for the whole of said lands in one body, at not less than two dollars and fifty cents per acre, from any other responsible parties; but no offer shall be considered from other parties than said Missouri River Railroad Company, unless accompanied by a certificate of deposit in the First National Bank of the city of Washington, D.C., to the credit of the said Secretary, for an amount equal to ten per cent of the aggregate value of the land at the price proposed, to be forfeited for the use of the Delawares if the sale should be awarded to said person or corporation so proposing to purchase the lands, and said party should fail to make payment as hereinafter provided.

Article VIII. That within sixty days after the sale of said land shall have been effected, the purchaser shall pay to the said Secretary, in trust for the Delawares, the stipulated price of said unallotted lands, with the appraised value of improvements thereon, excepting therefrom the mill reservation, and the quarter sections upon which the council-house and blacksmith shops are built, the use of which shall be retained until the final removal of the Delawares, and for which payment shall not be required from the purchaser until possession is delivered; and from time to time thereafter, as often as the Secretary of the Interior shall notify the said purchaser that ten thousand acres or more of said lands have been vacated by said Indians, within three months thereafter, said purchaser shall pay to the Secretary of the Interior, in trust for the said Indians, the stipulated price for said lands, with the appraised value of the improvements; and so on until all are paid for, according to the true intent and meaning hereof; and as said lands shall be paid for,

patents therefor, conveying the same in fee simple, shall be from time to time issued to said purchaser, or to his or its assigns, by the President of the United States.

ARTICLE IX. It is also stipulated that the Secretary of the Interior shall cause a registry to be made of the names of all said Delawares who have elected to dissolve their tribal relations and to become citizens of the United States, as provided in this treaty, with the names, ages, and sex of the members of the family of each of said Delawares, and present a certified copy of the same to the judge of the district court of the United States for the district of Kansas, and cause a copy to be filed in the office of the commissioner of Indian affairs, after which any of said Delawares, being adults, may appear before the said judge in open court, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and also make proof to the satisfaction of said court that he is sufficiently intelligent and prudent to control his own affairs and interests, that he has adopted the habits of civilized life, and has been able to support, for at least five years, himself and family; when he shall receive a certificate of the same under the seal of the said court; and on the filing of said certificate in the office of the commissioner of Indian affairs, the said Delaware Indian shall be constituted a citizen of the United States, and be entitled to receive a patent in fee simple, with power of alienation, for the land heretofore allotted to him, and his just proportion, in cash or in bonds, of the cash value of the credits of said tribe, principal and interest, then held in trust by the United States; and also, as the same may be received, his proportion of the proceeds of the sale of lands under the provisions of this treaty, when he shall cease to be a member of said tribe. Whereupon all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be

entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and in interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide guardianship for the protection of his rights and interests and those of his family. There shall be granted to each of the Delawares who have thus become citizens, a patent in fee simple for the lands heretofore allotted to them, and, if they do not remove with the nation, their pro rata share of all annuities and trust property held by the United States for them, the division to be made under the direction of the President of the United States, after which such persons shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities.

ARTICLE X. It is further agreed that the funds of the Delawares shall never be applied by the government to the payment of the debt or debts of any individual member or members of the nation; nor shall any person be licensed to trade with the Delawares without the consent of the chiefs and council; and the salaries of the chiefs shall henceforward be four hundred dollars per annum.

ARTICLE XI. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights.

ARTICLE XII. It is also agreed that if the said Secretary should not be able to sell the said lands as hereinbefore provided, he may cause the same to be appraised, in separate tracts, at their fair cash value, no tract to be valued at less than two dollars and fifty cents per acre, and the same when appraised may be sold at not less than the appraised value, and for as much more as the same will bring, and the money arising from the sale to be applied and distributed as hereinbefore provided.

ARTICLE XIII. It is agreed by the Delawares that railroad companies engaged in building roads whose routes shall lie through their new reservation in the Indian country shall have a right of way through and over said lands, not exceeding two hundred feet in width for any such road, and also the right to enter on all lands and take and use such gravel, stone, and other material except timber as may be necessary for the construction of such roads, compensation to be made for any damages done in obtaining such material, and for any damages arising from the location or running of such roads to improvements which shall have been made before such road shall have been located, such damages to be ascertained under regulations to be prescribed by the Secretary of the Interior.

ARTICLE XIV. The United States further agree that, in accordance with the general provisions of the sixth article of the Delaware treaty of May thirty, eighteen hundred and sixty, which have not yet been fulfilled, there shall be credited to the Delawares, in the purchase of their new reservation in the Indian country, the sum of thirty thousand dollars, which credit by the United States shall be received by the Delawares as a full settlement of all claims against the government for depredations upon timber to the date of the signing of this treaty; and the Delawares shall receive, without cost, from the United States, land included within their new reservation to the amount of twenty-three sections, in place of the twenty-three sections of half-breed Kaw lands referred to in said sixth section

of the treaty of eighteen hundred and sixty; and inasmuch as the Delaware claim that a large amount of stock has been stolen from them by whites since the treaty of eighteen hundred and fifty-four, the United States agree to have a careful examination of such claims made under the direction of the Secretary of the Interior, and when the value of such stolen stock shall have been ascertained, the same shall be reported to Congress with a recommendation for an appropriation to pay for the same; and all moneys appropriated for such purpose shall be paid to the owners of said stock.

ARTICLE XV. It is also agreed by the contracting parties that nothing contained in this treaty shall be so construed as to require the Delawares to remove from their present homes, until after they shall have selected and received title to lands for new homes elsewhere.

In testimony whereof, the said superintendent, agent, and special commissioner, on behalf of the United States, and the said chiefs and councillors on behalf of the Delawares, have hereunto set their hands and seals this fourth day of July, one thousand eight hundred and sixty-six.

THOS. MURPHY, [SEAL.]
Superintendent.

JOHN G. PRATT, [SEAL.]
Agent.

W. H. WATSON, [SEAL.]
Special Commissioner,

JOHN CONNOR, his x mark, [SEAL.]
Head Chief.

CAPTAIN SARCOXIE,
his x mark, [SEAL.]
Assistant Chief.

CHARLES JOURNEYCAKE, [SEAL.]
Assistant Chief.

JAMES KETCH[U]M, [SEAL.]
JAMES CONNOR, his x mark, [SEAL.]
ANDREW MILLER, his x mark, [SEAL.]
JOHN SARCOXIE, his x mark, [SEAL.]
Councillors.

ISAAC JOHNYCAKE,
U. S. Interpreter.

In presence of—

HENRY S. BULKLEY.
EDWARD S. MENAGER.
LOUIS A. MENAGER.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-sixth day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, by a resolution in the words and figures following to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES
July 26, 1866.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement between the United States and Delaware Indians, made at the Delaware Agency, Kansas, on the fourth day of July, one thousand eight hundred and sixty-six.

Attest: J. W. FORNEY, *Secretary.*

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-sixth of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this tenth day of August, in the year of our Lord one thousand
[SEAL.] eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

ANDREW JOHNSON.

By the President:

HENRY STANBERY, *Acting Secretary of State.*

Act of June 22, 1874, ch. 389, 18 Stat. 146 at 175.

* * *

For this amount, to enable the Secretary of the Interior to pay to the children of the Delaware Indians who became citizens of the United States under the provisions of the ninth article of the Delaware treaty of July fourth, eighteen hundred and sixty-six, and the children of Betsey Zeigler, who died before completing her citizenship under the provisions of said article, their proportionate share of the money and stocks held in trust by the United States for the Delaware tribe of Indians, fifty-four thousand five hundred and fourteen dollars and twenty-three cents, of which twenty-one thousand four hundred and forty-eight dollars and seven cents shall be deducted from the money-credits of said tribe, and thirty-three thousand and sixty-six dollars and sixteen cents, to be taken equitably from their several kinds of stock, shall be transferred to the Secretary of the Treasury and become the property of the United States: *Provided,* That if the Secretary of the Interior shall so determine, the whole amount hereby appropriated shall be taken from the money-credits of the tribe, the Secretary of the Interior to designate the funds from which said amounts shall be taken: *Provided,* That in the case of deceased persons, the Secretary of the Interior shall make

payment to their legal representatives; and said Delaware children are hereby declared to be citizens of the United States, with all the rights, privileges, and immunities of such; and the Secretary of the Interior is hereby authorized and directed to cause patents to issue in fee-simple to said persons for the lands allotted to them; and in case of the decease of any of said persons, the said patents shall issue in the names of such deceased persons, including the said Betsey Zeigler, and the title to the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life; and the Secretary of the Interior shall cause patents to be issued in fee simple in the names of Barbara Zeigler, Martha Zeigler, Samuel Ketchum, Nathan S. Tiblow, and Francis H. Grinter, who belonged to the families of the citizen class, and who died prior to the census of said Indians made by the agent under the provisions of the treaty of July fourth, eighteen hundred and sixty-six, for the lands allotted to them; and the lands designated in such patents shall inure to and become vested in the heirs, devisees, or assignees of said deceased patentees, as if the patent had issued to the deceased person during life.

* * *

Act of Apr. 21, 1904, ch. 1402, § 21, 33 Stat. 189 at 222.

* * *

The Secretary of the Treasury is authorized and directed to pay to the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct, the sum of one hundred and fifty thousand dollars in full of all claims and demands of said tribe against the United States, and the same is hereby appropriated and made immediately available: *Provided,* That said sum shall be paid only after the tribal authorities, thereunto duly and specifically authorized by the tribe, shall have signed a writing stating that such payment is in full of all claims and demands of

every name and nature of said Delaware Indians against the United States, which writing shall be subject to the approval of the President of the United States and shall have provided for the discontinuance of all actions pending in all courts wherein said Delaware Indians are plaintiff and the United States defendants.

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25 U.S.C. §§ 1181-86 (1970)

§ 1181. Distribution of judgment fund; preparation of Indian roll; eligibility

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements for eligibility: (a) They were born on or prior to and living on September 21, 1968; (b) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or (c) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census role as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary of the Interior, or (d) they are lineal descendants of Delaware Indians who were members of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818 (7 Stat. 188), and their name or the name of a lineal ancestor appears on any available census roll or any other records acceptable to the Secretary. No person shall be eligible to be enrolled under this section who is not a citizen of the United States. Applications for enrollment must be filed with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on forms prescribed for that purpose. All applications filed shall be reviewed and a judgment of the eligibility of each applicant will be made and recommendation given in writing to the respective area directors by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission

of names to the Secretary of the Interior for acceptance on the distribution roll. The determination of the Secretary regarding the utilization of available rolls or records and the eligibility for enrollment of an applicant shall be final.

Pub.L. 90-508, § 1, Sept. 21, 1968, 82 Stat. 861.

§ 1182. Division between Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma

There shall be withdrawn from the funds on deposit in the Treasury of the United States to the credit of the Delaware Nation that were appropriated by the Act of October 7, 1964 (78 Stat. 1033), and the interest accrued thereon, using the interest fund first, $7,000, which shall be divided equally between the Cherokee Delawares and the Delaware Tribe of Indians of Western Oklahoma, and shall be available for claims expenses incurred by the duly authorized personnel of the two tribal groups, as set forth in their joint resolution numbered 4-68 adopted on September 9, 1967.

Pub.L. 90-508, § 2, Sept. 21, 1968, 82 Stat. 861.

References in Text. The Act of October 7, 1964 (78 Stat. 1033), referred to in text, is the Supplemental Appropriation Act, 1965, Pub.L. 88-635. The portion of Pub.L. 88-635 which appropriated the funds referred to was not classified to the Code.

§ 1183. Equal share distribution

After the deduction of attorney fees and expenses, litigation expenses, all costs incident to the provisions of sections 1181-1186 of this title, and to making the payments authorized by sections 1181-1186 of this title, including the cost of roll preparation, which shall be paid by appropriate withdrawals from the judgment fund, the unexpended balance of the funds on deposit in the Treasury shall be distributed in equal shares to those persons whose names appear on the role prepared in accordance with section

1181 of this title. No person shall be entitled to more than one per capita share of the funds.

Pub.L. 90-508, § 3, Sept. 21, 1968, 82 Stat. 862.

§ 1184. Heirs of deceased enrollees

The Secretary shall distribute a share payable to a living enrollee directly to such enrollee. The Secretary shall distribute the per capita share of a deceased enrollee to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary whose findings upon such proof shall be final and conclusive. Sums payable to enrollees or their heirs or legatees who are less than twenty-one years of age or who are under a legal disability shall be paid in accordance with such procedures as the Secretary determines will best protect their interests.

Pub.L. 90-508, § 4, Sept. 21, 1968, 82 Stat. 862.

§ 1185. Tax exemption

The funds distributed under the provisions of sections 1181-1186 of this title shall not be subject to Federal or State income tax.

Pub.L. 90-508, § 5, Sept. 21, 1968, 82 Stat. 862.

§ 1186. Rules and regulations

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1181-1186 of this title, including a deadline for filing enrollment applications.

Pub.L. 90-508, § 6, Sept. 21, 1968, 82 Stat. 862.

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25 U.S.C §§ 1291-97 (Supp. IV, 1974)

§ 1291. Disposition of funds

The funds appropriated by the Act of December 26, 1969 (83 Stat. 447, 453), to pay a judgment in favor of the petitioners, the Delaware Tribe of Indians in docket 298,

and the Absentee Delaware Tribe of Western Oklahoma, and others, in docket 72, together with any interest thereon, after payment of attorney fees, litigation expenses, and such expenses as may be necessary in effecting the provisions of sections 1291 to 1297 of this title, shall be distributed as provided in such sections.

Pub.L. 92-456, § 1, Oct. 3, 1972, 86 Stat. 762.

References in Text. Act of Dec. 26, 1969 (83 Stat. 447, 453), referred to in the text, is Pub.L. 91-166, the Supplemental Appropriation Act, 1970, which was not classified to the Code.

§ 1292. Membership roll requirements

The Secretary of the Interior shall prepare a roll of all persons who meet the following requirements:

(a) they were born on or prior to and were living on October 3, 1972; and

(b) they are citizens of the United States; and

(c)(1) their name or the name of a lineal ancestor appears on the Delaware Indian per capita payroll approved by the Secretary on April 20, 1906, or

(2) their name or the name of a lineal ancestor is on or is eligible to be on the constructed base census roll as of 1940 of the Absentee Delaware Tribe of Western Oklahoma, approved by the Secretary.

Pub.L. 92-456, § 2, Oct. 3, 1972, 86 Stat. 762.

§ 1293. Applications for enrollment; filing date and place; notice and appeal of rejections; review

All applications for enrollment must be filed either with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, or with the Area Director of the Bureau of Indian Affairs, Anadarko, Oklahoma, on or before the last day of the fourth full month following October 3, 1972,

and no application shall be accepted thereafter. The Secretary of the Interior shall give a rejection notice within sixty days after receipt of an application if the applicant is ineligible for enrollment. An appeal from a rejected application must be filed with the Area Director not later than thirty days from receipt of the notice of rejection. The Secretary shall make a final determination on each appeal not later than sixty days from the date it is filed. Each application and each appeal filed with the Area Director shall be reviewed by a committee composed of representatives of the two Oklahoma Delaware groups prior to submission of the application or appeal to the Secretary, and the committee shall advise the Area Director in writing of its judgment regarding the eligibility of the applicant.

Pub.L. 92-456, § 3, Oct. 3, 1972, 86 Stat. 762.

§ 1294. Apportionment, credit, and disposition of funds

(a) The Secretary of the Interior shall apportion to the Absentee Delaware Tribe of Western Oklahoma, as presently constituted, so much of the judgment fund and accrued interest as the ratio of the persons enrolled pursuant to section 1292(c) (2) of this title bears to the total number of persons enrolled pursuant to section 1292 of this title. The funds so apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the tribe in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c) (2) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury, and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior.

(b) The funds not apportioned to the Absentee Delaware Tribe of Western Oklahoma shall be placed to the credit of the Delaware Tribe of Indians in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to section 1292(c)(1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested for any purpose that is authorized by the tribal governing body: *Provided,* That the Secretary of the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

Pub.L. 92-456, § 4, Oct. 3, 1972, 86 Stat. 762.

§ 1295. Payments to adults; trusts for minors and persons under legal disability

Sums payable to living enrollees age eighteen or older or to heirs or legatees of deceased enrollees age eighteen or older shall be paid directly to such persons. Sums payable to enrollees or their heirs or legatees who are under age eighteen or who are under legal disability other than minority shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interests of such persons.

Pub.L. 92-456, § 5, Oct. 3, 1972, 86 Stat. 763.

§ 1296. Income tax exemption

None of the funds distributed per capita under the provisions of sections 1291 to 1297 of this title shall be subject to Federal or State income taxes.

Pub.L. 92-456, § 6, Oct. 3, 1972, 86 Stat. 763.

§ 1297. Rules and regulations

The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of sections 1291 to 1297 of this title.

Pub.L. 92-456, § 7, Oct. 3, 1972, 86 Stat. 763.

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